or the agreement (R. 65) between the parties as to constructive placement, but it simply requires prompt placement, actual or constructive, and *prompt notice* to Consignee when the delay is attributable to Consignee.

Consignee continues to ignore the specific provision of the tariff applicable to "Interference Due to Strikes" (Rule 8, Section G, App. 12), although Consignee concedes (Br. 5) that Consignee, "for reasons undisclosed by the record, declined to take advantage of a relief provision in the tariff which affords a reduction in demurrage where unloading is prevented by strike interference (R. 88)."

The Carrier and Consignee stipulated in the trial court (R. 66) that "Concerning interference due to strikes, the applicable tariff provides:

> "'(1) When it is impossible to . . . unload . . . or receive cars from . . . this railroad because of strike interference at the point where the . . . unloading is to be accomplished, detention to each car due to that cause. . . .'"

will be computed on the statutory rate charge of $3.13 per car per day, provided claim in writing is presented to this railroad within thirty days after the strike ceases (R. 67).

In paragraph X of Consignee's Amended Answer (R. 55), Consignee admits that "it was *impossible for Defendant to unload or receive cars* during such period *because of the interference of such strike.*"

Consignee, in paragraph VI of its Answer (R. 50), stated that "it was *impossible for Defendant to unload or receive cars* consigned to it. The delays in unloading the cars" was due "solely to the interference of the strike of longshoremen at the Port of Houston." Further, Consignee, in paragraph VII of its Answer (R. 51), stated that "Plaintiff knew that it was *impossible for Defendant to unload to*

(sic) *receive cars* during such period *because of the interference of such strike . . .*"

As held by the District Court, to accept Connell's contention that there can not be constructive placement unless the delay is attributable to some fault of the consignee, "would *negate the strike interference provision*" unless the strike were in some manner a result of the consignee's fault.

In addition, Rule 5 (App. 12) expressly provides that:

> "• • • Under this rule the time of movement between hold point and destination and any other time *for which the railroad is responsible* will not be computed against the consignee.
>
> "Section A.—
>
> "1. When delivery of a car . . . *cannot be made on account of the inability of consignee to receive* it, or because of any other condition attributable to the consignee, *such car will be held at* destination, or, if it cannot reasonably be accommodated there, at *an available hold point,* notice shall be sent or given to consignee in writing or, in lieu thereof, as otherwise agreed to in writing, that the car is held and that this railroad is unable to make delivery. *This will be considered constructive placement.*"

It was undisputed (Stipulation 5, R. 65) "that a car in local switch traffic for delivery at a terminal's docks would be considered as constructively placed within the meaning of" Rule 5 "without notice from 7:00 o'clock a.m. of the first day on which the clerk's yard check locates the car in the storage yard of the terminal." It was further undisputed (Stipulation 6, R. 66) that the exhibits attached to the complaint "accurately reflect . . . the number of days each car was held from the date on which the clerk's yard check located each car in the storage yard of the terminal."

The purpose of Service Order No. 947, as stated by the Interstate Commerce Commission, was "to promote car service in the interest of the public" because the present practices "are insufficient to *promote the most efficient utilization of cars,*" and it requires the Carrier to make actual *or constructive* placement of the cars "within 24 hours." Service Order No. 947 does not define constructive placement, while *Rule 5 expressly defines constructive placement.* However, wherein Rule 5 merely requires constructive placement notice to be given the Consignee in writing or, "in lieu thereof, as otherwise agreed to in writing," (as in this case), Service Order 947 makes it imperative that "when delivery of a car . . . cannot be made *on account of any condition attributable to the consignee . . . constructive placement notice* shall be sent or given the consignee *in writing within 24 hours.*"

To argue, as Consignee does here, that constructive placement cannot be made except when the Consignee is at fault is to suggest that the Consignee should make no efforts "to promote the most efficient utilization of cars" contrary to the stated purpose of Service Order No. 947 and the fact that:

> "Demurrage charges are in the nature of a penalty that is assessed against railroads and shippers alike in order to promote prompt loading and unloading of cars." Port Terminal Railroad Ass'n. v. Connell Rice & Sugar Co., 387 F.2d 355, 357 (5th Cir., 1967).

Consignee completely ignores the unequivocal provisions for assessing demurrage charges under Rule 8, Section G (App. 12) whenever there is "Interference Due to Strikes."

Consignee's inability to receive the cars from Carrier due to strike interference at the point of unloading was not due to the actions of those for whom Carrier was responsible.

Consignee contends that Carrier is "responsible for" the employees of Gulf Atlantic who honored the strike of the "deep sea locals" because Carrier had a contract with Gulf Atlantic Warehouse Company setting the rates for unloading services on "line haul" charges (R. 73), even though the cars involved herein were moving on switching charges (R. 69), and the unloading charges were required to be billed to and collected from Consignee (R. 70, R. 73). "Line haul" carriers moved the cars from the originating point and delivered same to Carrier herein who only moved the cars in "switching traffic". Furthermore, "The duty of loading and unloading carload shipments rests upon the shipper or consignee. * * *" *Pennsylvania R. Co.* v. *Kittaning I. & S. Mfg. Co.*, 253 U.S. 319, 323, 64 L.Ed. 928, 930, 40 S. Ct. 532 (1920).

Gulf Atlantic was an independent contractor (R. 75, Article VII), and the contract with Gulf Atlantic expressly provided (R. 73):

> "The payments to be made hereunder by Railroads shall be made only on such . . . traffic . . . which moves on line haul charges. On all freight moving on switching charges the Contractor (Gulf Atlantic) will collect loading and unloading charges from consignor or consignee."

As held by the District Court, there was no evidence whatever of any control by Carrier over Gulf Atlantic, its employees (the "warehouse locals"), or the "deep sea locals" such as to make them agents or employees of this Carrier. Consignee argues that such employees of Gulf Atlantic were agents of Carrier under authority of the

decision of this Honorable Court in *Sinkler* v. *Missouri Pacific R. R. Co.*, 356 U.S. 326, 2 L.Ed. 2d 799, 78 S.Ct. 758 (1958), wherein, in an action by *an injured employee* of the defendant railroad under the FELA, it was held that, page 804, ". . . . When a railroad employee's *injury* is caused in whole or in part by the fault of others performing, under contract, operational activities of his employer, such others are 'agents' of the employer *within the meaning* of § 1 of FELA." However, the Court pointed out that, page 802, "This statute, an *avowed departure from the rules of common law*, . . . was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety," that, page 803, "This broad purpose controls our decision. . . ." and that ". . . an *accommodating scope* must be given to the word 'agents' to give vitality to the standard governing the *liability of carriers to their workers injured on the job.*" Further, it should be pointed out that two Justices concurred in the results on the basis that it was a non-delegable duty of the carrier, and two Justices dissented on the basis that the "independent contractor railroad" was not an "agent".

That decision is wholly inapplicable to the determination of whether or not the Carrier herein was at fault in connection with the delay resulting from the strike by the "deep sea locals."

Furthermore, Consignee here, unlike the railroad employee in the *Sinkler* case, is neither helpless, nor without recourse. First of all, Consignee could have removed the cars to other destinations (R. 19 and 20). Secondly, express relief is provided the Consignee for demurrage accruing due to "strike interference at the point of unloading" in the form of a reduced demurrage rate in the amount

of $3.13 per car per day, which Consignee refused to accept although advised on "two occasions" (Stipulation 9, R. 68) to do so, or Consignee could have sought relief in a proceeding before the Interstate Commerce Commission to have the Interstate Commerce Commission *waive the demurrage or reduce the demurrage rates* assessed under the tariff. *I.C.C.* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576, 86 S. Ct. 1000, 16 L.Ed.2d 109 (1966); *Pennsylvania Railroad Co.* v. *Moore-McCormack Lines, Inc., supra.*

CONCLUSION

Carrier prays that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

Rule 5, Section A, I.C.C. H-17, Freight Tariff 4-G

For the purpose of this rule, the term "Consignee" means the party to whom a shipment is consigned, or the party entitled to receive the shipment. Under this rule the time of movement between hold point and destination and any other time for which the railroad is responsible will not be computed against the consignee.

Section A. —

1. When delivery of a car consigned or ordered to an industrial interchange track or to other-than-a-public-delivery track cannot be made on account of the inability of consignee to receive it, or because of any other conditions attributable to the consignee, such car will be held at destination, or, if it cannot reasonably be accommodated there, at an available hold point, notice shall be sent or given the consignee in writing or, in lieu thereof, as otherwise agreed to in writing, that the car is held and that this railroad is unable to make delivery. This will be considered constructive placement.

Rule 8, Section G, I.C.C. H-17, Freight Tariff 4-G

Section G. — Interference Due to Strikes.

1. When it is impossible to load or unload (including partial loading or unloading) or receive cars from or make cars available to this railroad because of strike interference at the point where the loading or unloading is to be accomplished, detention to each car due to that cause from the first 7:00 A.M. after such interference begins until the first 7:00 A.M. after such interference ceases as to each car will be excluded in computing free time provided in Rule 2, pages 56 and 57 of tariff, and computing charges provided

in Rule 7, page 64 of tariff, or in Rule 9, pages 71 to 74 of tariff. Such detention on loaded or empty cars (other than empty cars held for prospective loading, which have not been appropriated for loading — see Rule 6, Section D, page 63 of tariff), will be charged for at the rate of $3.13 per car per day or fraction of a day, including Saturdays, Sundays and holidays (See Item 25) and without free time allowance; provided claim in writing is presented to this railroad within 30 days, exclusive of Saturdays, Sundays and holidays (See Item 25), after the date on which strike ceases, stating the date and time interference began and ceased.